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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 In re SFPP Right-of-Way Claims

Case No. 8:15-CV-00718-JVS-DFM

**REPLY IN SUPPORT OF KINDER
MORGAN'S MOTION TO DISMISS
AND MOTION TO STRIKE**

ORAL ARGUMENT REQUESTED

Judge: Hon. James V. Selna
Date: January 21, 2016
Time: 8:00 a.m.
Courtroom: 10C – Santa Ana

Complaint Filed: May 5, 2015
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs' Opposition confirms the fatal flaw in the Consolidated Amended
3 Complaint ("CAC"): Plaintiffs have not pled factual allegations to support their
4 claim to own the subsurface of Union Pacific's right-of-way. Despite Plaintiffs'
5 protestations to the contrary, the CAC's statements that Plaintiffs "are the fee title
6 holders of the land" under the right-of-way are **legal conclusions**, not factual
7 averments, and thus they do not suffice. The CAC is also devoid of facts to render
8 plausible Plaintiffs' assertion that their predecessors-in-interest "intended to and did
9 grant and convey the subsurface to Plaintiffs and to the Class Members."

10 Plaintiffs contend they are not relying on the "centerline presumption," but
11 this is not consistent with their arguments opposing the prior motions to dismiss, or
12 the allegations in the CAC. In any event, the Opposition's discussion of the
13 "centerline presumption" is misplaced. And although Plaintiffs claim to know the
14 basis for their alleged ownership interests, including their chain of title, they have
15 inexplicably failed to plead it. This raises serious concerns, especially because
16 Plaintiffs have effectively conceded that they dropped **more than twenty-seven**
17 prior named plaintiffs for lack of standing. Each of Plaintiffs' claims, which merely
18 assume ownership of the right-of-way subsurface, should be dismissed.

19 Plaintiffs' attempt to plead a class claim for Quiet Title fails for the
20 additional reason that it requires **individual verification at the pleading stage**.
21 The California statutory requirement that quiet title claims be verified is substantive
22 and routinely applied in federal court, and Plaintiffs do not dispute that they can
23 "verify" only their individual claims. Further, demonstrating standing to assert
24 quiet title claims in this case is impossibly individualized, as evidenced by
25 Plaintiffs' counsels' admissions, and their decision to drop all but two of the named
26 plaintiffs from the CAC. A court is authorized to strike class allegations prior to
27 discovery where a legal claim involves individualized elements that cannot be pled,
28 let alone adjudicated, on a class basis.

1 The claim under California Business & Professions Code section 17200
 2 (“Section 17200”) should be dismissed to the extent it is an impermissible request
 3 for nonrestitutionary disgorgement. The Opposition and CAC suggest that
 4 Plaintiffs are seeking restitution of Defendants’ profits, but Plaintiffs fail to – and
 5 indeed could not – allege an ownership interest in such profits. Plaintiffs cannot
 6 seek nonrestitutionary disgorgement under Section 17200 as a matter of law.
 7 Further, Plaintiffs’ request for vague and unspecified “benefits” should be stricken
 8 from the CAC because it could only serve to confuse the issues, cause delay, and
 9 prejudice Defendants with burdensome discovery requests into irrelevant matters.

10 The Accounting claim also fails as a matter of law and should be dismissed.
 11 Plaintiffs cite no authority to support their assertion that the relationship between a
 12 dominant estate holder and servient estate holder is the type of “special
 13 relationship” that warrants an accounting. Nor can Plaintiffs allege any other basis
 14 for an accounting, or demonstrate an inadequate remedy at law.

15 In sum, after nine attempts at the complaint, and allegedly spending more
 16 than 4,600 hours on the litigation, Plaintiffs’ CAC is still deficient. Kinder Morgan
 17 requests that the CAC be dismissed in its entirety.

18 **II. ARGUMENT**

19 **A. Plaintiffs Do Not Adequately Plead An Ownership Interest In The** 20 **Subsurface Of The Right-Of-Way.**

21 **1. Plaintiffs’ Conclusory Legal Assertions Regarding** 22 **Ownership Are Not Factual Allegations.**

23 Pointing to disparate paragraphs of the CAC, Plaintiffs contend they have
 24 pled facts to support their alleged ownership of the subsurface of the right-of-way.
 25 (Opp. at 2:26-28.) Plaintiffs are wrong. Instead of pleading facts, Plaintiffs offer
 26 only legal conclusions, insufficient to withstand a motion to dismiss.
 27
 28

1 Plaintiffs point to the following:

- 2 (1) Plaintiffs' recitation of the history of the Congressional Acts and
3 their characterization of the nature of the rights granted under those
4 acts (*id.* at 3:1-14, 20-22 [citing CAC ¶¶ 12-55]);
- 5 (2) Plaintiffs' allegation that they "own the land adjoining and
6 underlying the right-of-way, which contains the pipeline" (*id.* at
7 3:24-26 [citing CAC ¶¶ 68, 69, 73, 111, 121, 126, 131]);
- 8 (3) Plaintiffs' allegation that "no one in their chain of title retained or
9 separately conveyed the interest in the right-of-way" (*id.* at 3:26-
4:1 [citing CAC ¶ 53]); and
- 10 (4) Plaintiffs' allegation that they are the "successors to the ancestors
11 in title" who granted surface easements to Union Pacific (*id.* at 4:1-
5 [citing CAC ¶¶ 21, 53]).

12 **These are not facts**, and they are not sufficient (together or separately) to
13 allege that Plaintiffs have an ownership interest in the subsurface of Union Pacific's
14 right-of-way where pipeline is located. With respect to the first point, the nature of
15 the Congressional Acts, merely asserting that Union Pacific does not own the
16 subsurface under its right-of-way does not mean that Plaintiffs do.

17 The second point is legal conclusion. A review of the paragraphs of the CAC
18 that Plaintiffs cite proves the point. Paragraph 68 states that Plaintiffs "are
19 seeking...**a declaration that they are the true owners of the property**
20 **underneath the Railroad's right-of-way.**" (CAC ¶ 68 [emphasis added].) Asking
the Court to ultimately declare that Plaintiffs "are the true owners of the property
underneath the Railroad's right-of-way" is not a factual allegation.

21 Likewise, Plaintiffs' citation to the proposed class definition is not a factual
22 allegation. (*Id.* ¶ 69 [defining proposed class as: "[A]ll landowners who own or
23 have owned land in fee adjoining and underlying the railroad easement under which
24 the pipeline is located within the State of California."].) Nor is Plaintiffs' citation
25 to their typicality allegation. (*Id.* ¶ 73.) And Plaintiffs' remaining paragraphs offer
26 only the legal assertion that "Plaintiffs and the Class are the fee title holders of the
27 land under the Railroad's right-of-way...." (*Id.* ¶¶ 111, 121, 131; *see also id.*

¶ 126.) None of these allegations offer **facts** to support a claim that Plaintiffs could own the subsurface under Union Pacific’s right-of-way.

The third and fourth points are based on paragraph 53 of the CAC, in which Plaintiffs allege: “Upon information and belief, Plaintiffs’ and the Class Members’ predecessors in title did not retain rights in the subsurface of the rights-of-way, but intended to and did grant and convey the subsurface to Plaintiffs and to the Class Members.” (*Id.* ¶ 53.) This is not a factual allegation; it is one of the ultimate conclusions that Plaintiffs must prove to establish their claims to the subsurface. Despite asserting that they can do so (Opp. at 8:6-10, 10:12), Plaintiffs do not allege their chain of title or submit the deeds necessary to support their chain of title. There is thus no plausible basis for this conclusory allegation in the CAC, and it must be disregarded.¹

In short, Plaintiffs offer no facts to support a claim that they could own the subsurface under Union Pacific’s right-of-way, only legal conclusion.² The Court cannot regard such legal conclusion as facts sufficient to plead a viable claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (court must disregard legal conclusions and complaint must allege “plausible” claim to relief; must be more than “unadorned, the-defendant-unlawfully-harmed-me accusation”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (court must not accept “labels and conclusions” and “[f]actual allegations must be enough to raise a right to relief above the speculative level”).

¹ Because Plaintiffs claim to know the basis for their alleged ownership interests, they cannot rely on “information and belief” allegation. *See Medicinova, Inc. v. Genzyme Corp.*, No. 14-CV-2513L KSC, 2015 WL 5007827, at *3 (S.D. Cal. Aug. 19, 2015). Further, contentions made on information and belief must still be based on “non-conclusory factual allegation,” which is lacking here. (*E.g.*, Opp. at 4 n.1.)

² Plaintiffs’ additional citations to the CAC (Opp. at 2:28) are also insufficient for the reasons discussed above.

1 Further, this is not a mere pleading deficiency. More than **twenty-seven**
2 named plaintiffs have already been dropped from the pleadings for lack of standing
3 – a point the Opposition tellingly does not dispute.

4 **2. Plaintiffs Misapply The Centerline Presumption, And Fail**
5 **To Allege Their Chain Of Title.**

6 In an about-face from their opposition to the prior motions to dismiss (*see*
7 Dkt. No. 47 at 4:8-26), Plaintiffs now argue that the centerline presumption “should
8 not be applied at the pleading stage.” (Opp. at 5:9-18.) Plaintiffs’ argument
9 amounts to a concession that the Court should not consider the centerline
10 presumption in construing the CAC. Without the centerline presumption, Plaintiffs
11 are left only with their unspecified, conclusory allegations of “fee ownership” in the
12 subsurface, which, as explained, are insufficient.

13 In any event, Plaintiffs’ view of the centerline presumption is incomplete,
14 and overly simplistic. Plaintiffs contend that the deeds to their land “do not contain
15 metes and bounds descriptions, and thus, the centerline presumption applies.”
16 (Opp. at 10:6-7.) This is wrong, and Plaintiffs cite no authority for this proposition.
17 A metes and bounds description which excludes an adjacent monument is simply
18 one instance in which the centerline presumption does not apply. *See* MILLER &
19 STARR: CALIFORNIA REAL ESTATE § 8:65 (4th ed. 2015) (listing circumstances
20 where presumption is inapplicable).³

21 The centerline presumption also does not apply where a deed uses the side or
22 edge line of the right-of-way, and not the right-of-way itself, as the point of
23 departure for the land. *See id.* Such a description “shows an intent to give title only
24

25 ³ Moreover, “metes and bounds” is a general term that can refer to, among other
26 things, descriptions of lands by reference to natural or artificial boundaries. 1
27 PATTON & PALOMAR ON LAND TITLES § 126 (3d ed. 2015). For example, the deeds
28 for the Wells properties describe the land with reference to their boundary lines, and
thus **do** contain “metes and bounds” descriptions. (*See* CAC Exs. A and B.)

1 to the side line” of the right of way. *Warden v. S. Pasadena Realty & Imp. Co.*, 178
2 Cal. 440, 442 (1918) (deed conveying land along “the southerly line of Foothill
3 street’...does not give the grantee title to the center of that street”); *see also City of*
4 *Redlands v. Nickerson*, 188 Cal. App. 2d 118, 126-27 (1961) (deed conveying land
5 “along said Northerly line of West State Street” was of the type which “does not
6 include a conveyance to the center of the street”)⁴; *Speer v. Blasker*, 195 Cal. App.
7 2d 155, 159-61 (1961) (deed that described property as bounded by sideline of
8 street did not convey center of street); *Roeder Co. v. Burlington N., Inc.*, 105
9 Wash.2d 567, 578-79 (1986) (en banc).

10 The deeds for the Wells’ Riverside parcel use the “line” of the railroad right-
11 of-way, and not the right-of-way itself, as the point of departure for the land. (*See*
12 CAC Ex. A [stating that property lies “Northeasterly **of the Northeasterly line** of
13 the 200 foot right of way” (emphasis added)].) Accordingly, regardless of
14 Plaintiffs’ argument that the deeds do not contain metes and bounds descriptions,
15 the centerline presumption does not apply. *See Warden*, 178 Cal. at 442; *City of*
16 *Redlands*, 188 Cal. App. 2d at 126-27, *Speer*, 195 Cal. App. 2d at 159-61.

17 Moreover, with respect to all properties, Plaintiffs do not allege their chain of
18 title, or facts sufficient to plead that they obtained their interests from the fee owner
19 of the right-of-way. Plaintiffs do not dispute that the centerline presumption is
20 inapplicable “where the adjoining landowner presents no evidence of having
21 received his or her property from the owner of the right of way.” *Roeder*, 105
22 Wash. 2d at 578; *see also Sammamish Homeowners v. Cnty. of King*, No. C15-284
23 MJP, 2015 WL 3561533, at *2 (W.D. Wash. June 5, 2015); MILLER & STARR,
24 *supra* § 8:65 (centerline presumption inapplicable, *inter alia*, “[w]hen the person

25
26
27 ⁴ Although the deeds in *Warden* and *City of Redlands* contained more lengthy metes
28 and bounds descriptions than those here, that was not the reason why the centerline
presumption did not apply in those cases. (*Cf. Opp.* at 9:11-28.)

1 recording a map that dedicates a street is not the owner of the adjacent street or
2 easement”) (citing *Norcross v. Adams*, 263 Cal. App. 2d 362, 365-68 (1968)).

3 This is especially problematic given Plaintiffs’ claim that they are “prepared
4 to provide [their] chains of title.” (Opp. at 10:12.) Kinder Morgan is entitled to fair
5 notice of the grounds upon which Plaintiffs’ claims to title rest. Absent this
6 information, there is nothing in the CAC to explain *how* Plaintiffs purportedly
7 received an ownership interest in the subsurface of the right-of-way. Plaintiffs are
8 concealing the alleged basis for the title, choosing instead to hide behind conclusory
9 allegations. The claims in the CAC are deficient, and the Court should require
10 Plaintiffs to sufficiently allege their chain of title.

11 **B. Plaintiffs Do Not Adequately Plead The Quiet Title Claim, And**
12 **Cannot Satisfy The Verification Requirement On A Class Basis.**

13 Plaintiffs’ defense of the Quiet Title claim also relies on the CAC’s
14 conclusory claims of “fee ownership.” (Opp. at 10:25-11:1 [citing CAC ¶¶ 111,
15 121, 51-53].) As explained above, this is insufficient. To properly assert a claim
16 for quiet title, Plaintiffs must allege a factual basis for their claim to ownership of
17 the property, which they have not done. (*See* Dkt. No. 108-1 at 7:24-8:9.)

18 The cases Plaintiffs cite further illustrate the deficiencies in their pleading.
19 For example, the quiet title claimant in *Bunch v. Indian Palms Vacation Club*
20 *Owners Ass’n, Inc.*, traced its title to a source common to both parties. No. EDCV
21 11-01963-VAP, 2013 WL 2155383, at *5 (C.D. Cal. May 16, 2013). Likewise, the
22 plaintiffs in *Freeman v. Affiliated Prop. Craftsmen* traced their title “to the original
23 owner and subdivider of the property” that was the subject of the quiet title action.
24 266 Cal. App. 2d 723, 729 (1968). In *S. Shore Land Co. v. Peterson*, the quiet title
25 claimant alleged her full chain of title, beginning with the grant of a tract of land
26 from the King of Spain in 1820, and ending with a quitclaim deed in 1961. 226
27 Cal. App. 2d 725, 737-38 (1964). Plaintiffs here plead no such chain of title facts.

1 Plaintiffs also cannot avoid that the statutory verification requirement dooms
2 their attempt to bring the quiet title claim on a class basis. *See* CAL. CODE CIV.
3 PROC. § 761.020 (“Section 761.020”). Plaintiffs’ half-hearted contention that the
4 verification requirement does not apply in federal court is disingenuous. In direct
5 response to Kinder Morgan’s prior motion to dismiss, Plaintiffs have verified their
6 individual quiet title claims, essentially conceding that the requirement applies.
7 Further, Plaintiffs are wrong, and their argument ignores the great weight of
8 authority applying the verification requirement in federal court. (*See* Mot. at 8:20-
9 24 [citing cases]; *see also* Dkt No. 51 at 7:21-9:5.)

10 Plaintiffs argue that Kinder Morgan “fails to cite a single case supporting its
11 [motion to strike],” but they ignore the cases cited by Kinder Morgan, which state
12 that the court “has authority to strike class allegations prior to discovery if the
13 complaint demonstrates that a class action cannot be maintained.” *Tietsworth v.*
14 *Sears*, 720 F. Supp. 2d 1123, 1147-48 (N.D. Cal. 2010) (granting motion to strike
15 class allegations where claims involved “elements that are individual to each class
16 member”); (*see also* Mot. at 8:13-19 [citing cases].) Here, there is no possible way
17 that claims to quiet title over more than **1,100** miles of subsurface can be verified on
18 a class-wide basis, and Plaintiffs do not demonstrate the contrary. (*See* CAC ¶ 25
19 [alleging “more than 1,100 miles [of pipeline] within the State of California”].)

20 Instead of addressing Kinder Morgan’s arguments, Plaintiffs rely on
21 inapposite cases. First, *United States v. S. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir.
22 1976), originated in Nevada, which unlike California, has no general verification
23 requirement. *Twain Harte Homeowners Ass’n v. Patterson*, 193 Cal. App. 3d 184,
24 186-87 (1987), did not address the propriety of asserting class claims to quiet title
25 or the verification requirement. Instead, *Twain Harte* addressed whether an
26 association had standing to assert quiet title claims. Moreover, unlike the more than
27 1,100 miles of California subsurface, in which Plaintiffs seek to quiet title here,
28 Plaintiffs’ cited cases each involve a single tract of (non-subsurface) land.

1 Section 761.020's verification requirement is not a "state procedural
2 requirement," as Plaintiffs contend (Opp. at 13:3-4); it is a substantive rule of law.
3 *See Computer Econ., Inc. v. Gartner Grp., Inc.*, 50 F. Supp. 2d 980, 990 (S.D. Cal.
4 1999) (state rules that are substantive, and thus must be applied by federal courts,
5 include those that "define the elements of a cause of action"); (*see also* Dkt No. 51
6 at 7:21-9:5). For this reason, Plaintiffs' citation to *Shady Grove Orthopedic*
7 *Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) is misplaced.

8 Plaintiffs also ignore that this is not a straightforward quiet title action;
9 Plaintiffs are asking to quiet title to the subsurface of railroad right-of-way acquired
10 by Congressional Act in the 1800s on behalf of hundreds, if not thousands, of
11 different alleged landowners. Indeed, Plaintiffs' counsel has admitted that proving
12 title in this case is "challenging" and "fraught with the possibility of error." (Dkt.
13 No. 72 at 7:3-25; Dkt. No. 93-1 at 1:14-17.) Plaintiffs also do not dispute that they
14 have already dropped more than twenty-seven named plaintiffs from the
15 consolidated action for lack of standing. Nor do they explain why they only named
16 two plaintiffs in the CAC, even though Plaintiffs' counsel claims to have identified
17 more than 150 putative class members in California. Plaintiffs should not be able to
18 circumvent the verification requirement by dropping plaintiffs from the pleading,
19 but seemingly still asserting quiet title claims on their behalf.

20 Finally, although Plaintiffs argue that Kinder Morgan's motion to strike is
21 premature, "it is procedurally proper to strike futile class claims at the outset of
22 litigation to preserve time and resources." *Stearns v. Select Comfort Retail Corp.*,
23 No. 08-2746 JF (PVT), 2009 WL 4723366, at *14 (N.D. Cal. Dec. 4, 2009); *see*
24 *also Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, at 990 (N.D. Cal. 2009) ("Where
25 the complaint demonstrates that a class action cannot be maintained on the facts
26 alleged, a defendant may move to strike class allegations prior to discovery.");
27 *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D. Kan. 2004) ("Federal courts
28 have used motions to strike to test the viability of a class at the earliest pleading

1 stage of the litigation.”) As such, the Court can and should strike the class
2 allegations from Plaintiffs’ quiet title claim.

3 **C. Plaintiffs’ Request For Unspecified “Benefits” Under Section**
4 **17200 Is Improper.**

5 Plaintiffs contend they are not seeking nonrestitutionary disgorgement, but
6 are instead seeking to recover “the benefits of their real property from Kinder
7 Morgan, in addition to other restitutionary relief that will likely be ascertained in
8 discovery.” (Opp. at 17:24-26.) However, Plaintiffs still do not explain what these
9 purported “benefits” and other “restitutionary relief” are, or under what theory they
10 claim to be entitled to them.

11 To the extent Plaintiffs are seeking restitution of Kinder Morgan’s profits, as
12 the Opposition and the CAC suggest, Plaintiffs *are* seeking nonrestitutionary
13 disgorgement, because their request focuses on Kinder Morgan’s gain and “would
14 not replace any money or property that [the] defendant[] took directly from [the]
15 plaintiff.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144-45
16 (2003). Because Plaintiffs have not – and cannot – allege an ownership interest in
17 Kinder Morgan’s profits, such relief is not available to them under Section 17200.
18 *Id.* Plaintiffs’ own authority demonstrates that damages allegations may be
19 dismissed under Rule 12(b)(6) where, as here, they are precluded as a matter of law.
20 *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010).

21 Further, Plaintiffs are wrong that they need not allege an ownership interest
22 in benefits or profits at the pleading stage. *See L.A. Taxi Coop., Inc. v. Uber Techs.,*
23 *Inc.*, No. 15-CV-01257-JST, 2015 WL 4397706, at *10 (N.D. Cal. July 17, 2015)
24 (dismissing Section 17200 claim where the plaintiff failed to “allege an ownership
25 interest” in requested profits); *BizCloud, Inc. v. Comput. Sci. Corp.*, No. C-13-
26 05999 JCS, 2014 WL 1724762, at *4 (N.D. Cal. Apr. 29, 2014) (dismissing Section
27 17200 claim that did not plead facts showing vested interest in profits); *see also*
28 *Casault v. Fed. Nat’l Mortgage Ass’n*, 915 F. Supp. 2d 1113, 1128-29 (C.D. Cal.

2012) (“plaintiffs...must state with reasonable particularity the facts supporting the statutory elements of the violation” of Section 17200).

Additionally, Plaintiffs’ request for unspecified “benefits” is subject to a motion to strike under Rule 12(f). Plaintiffs cite *Whittlestone* to argue the motion to strike is procedurally improper, but the court in that case held that a claim for damages was not “immaterial” under Rule 12(f) because the ability of the plaintiff to collect damages had not yet been decided and thus related directly to the claim for relief. 618 F.3d at 974. Here, by contrast, it is undisputed that nonrestitutionary disgorgement is not recoverable under Section 17200 as a matter of law. *See Korea Supply*, 29 Cal. 4th at 1144-45. Thus, to the extent that Plaintiffs’ request for “benefits” is in reference to Kinder Morgan’s profits, it is immaterial to the underlying claim, and should be stricken.

Plaintiffs’ request for “benefits” should also be stricken because it is so vague and uncertain that Kinder Morgan cannot discern what Plaintiffs are requesting. In cases cited by Plaintiffs, courts **granted** a motion to strike where immaterial information created risk of delay and confusion, or was potentially prejudicial. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152-53 (C.D. Cal. 2003). Here, Plaintiffs’ request for “benefits” would only serve to confuse the issues and cause delay, as it is not clear what “benefits” Plaintiffs are asking for. Plaintiffs may attempt to use a request for “benefits” to justify a discovery fishing expedition into Defendants’ profits and other claimed “benefits,” which would cause prejudice and undue burden and expense to Kinder Morgan.

Finally, Kinder Morgan has requested an order from the Court that its profits are not available to Plaintiffs under Section 17200. Plaintiffs do not address this request, and give no reason why it should not be granted.

D. Plaintiffs' Accounting Claim Fails As A Matter Of Law.

Plaintiffs contend that “[t]he nature of the relationship between the owner of a dominant estate and the owner of the servient estate is the type of ‘special relationship’ that merits an accounting.” (Opp. at 22:26-28.) Plaintiffs cite no authority supporting this proposition. Indeed, *Red Mountain LLC v. Fallbrook Public Utility Dist.*, 143 Cal. App. 4th 333, 362 (2006) is not an accounting case.

The accounting cases that Plaintiffs do cite for this point involve circumstances where the parties had a written agreement for payment of rent or profits. *See Frye v. Sibbitt*, 145 Neb. 600, 603 (1945) (indenture that provided for annual payments to owner of servient estate); *McPherson v. Empire Gas & Fuel Co.*, 122 Cal. App. 466 (1932) (oil and gas lease providing for payment of royalties); *Old Republic Ins. Co. v. Superior Court*, 66 Cal. App. 4th 128, 135-36 (1998) (written commercial lease agreement). Plaintiffs have alleged no such written agreement. Further, none of these cases contain a substantive discussion of the requirements for an accounting, or explain why an accounting could be appropriate under the particular circumstances. Plaintiffs’ authorities are inapposite, and do not change the fact that there is no special relationship between Kinder Morgan and Plaintiffs to warrant an accounting claim.

Nor can Plaintiffs show that their purported damages “would be difficult to ascertain...through ordinary means.” (CAC ¶ 176.) Plaintiffs point to their generalized claims of wrongdoing (Opp. at 23:14-27), but none of these allegations explains why an accounting is justified. Plaintiffs can pursue adequate remedies at law, and thus their request for an accounting is inappropriate.

Finally, Plaintiffs’ citation to *Peninsula Props., Co. v. Santa Cruz Cnty.*, 34 Cal. 2d 626 (1950) and *Grocers’ Fruit Growing Union v. Kern Cnty. Land Co.*, 150 Cal. 466 (1907) does not save the accounting claim. Neither of these cases awarded an accounting. Further, Plaintiffs do not explain why they believe these cases are relevant, or how these cases could apply to the facts and Plaintiffs’ accounting

1 claim here. Plaintiffs' accounting claim fails as a matter of law, and should be
2 dismissed with prejudice.

3 **III. CONCLUSION**

4 For the reasons stated above and in the Opening Memorandum, Kinder
5 Morgan respectfully requests that the Court grant its Motions, and dismiss
6 Plaintiffs' CAC for failing to adequately plead an ownership interest in the
7 subsurface of the right-of-way; dismiss Plaintiffs' Quiet Title, Section 17200, and
8 Accounting claims; strike Plaintiffs' class allegations with respect to the Quiet Title
9 claim; and strike Plaintiffs' improper request for "benefits" under Section 17200.

10 Dated: January 11, 2016

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